UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KEVIN E. WOOD, Appellant, v. DEPARTMENT OF THE AIR FORCE and DEPARTMENT OF THE NAVY, Agencies.	DOCKET NUMBERS AT1221920335-W-1 AT0752920448-I-1 AT0752920449-I-1[1]
	DATE: JUL 31 1992

Kevin E. Wood, Panama City, Florida, pro se.

Major Flayo O. Kirk, Eglin Air Force Base, Florida, for the Department of the Air Force.

Steve R. Conway and Starr J. Stinton, Panama City, Florida, for the Department of the Navy.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued February 19, 1992, that dismissed his appeal

[1] The appellant had challenged all of the personnel actions described below in a single petition for appeal filed with the Atlanta Regional Office, which adjudicated all matters in a single initial decision under a common docket number, AT1221920335-W-1. After the initial decision was issued, the two additional docket numbers, which refer to the appeals taken against the Department of the Navy, were added for administrative purposes.

against the Air Force as untimely filed, and dismissed his appeals against the Navy, in part for lack of jurisdiction, and in part as res judicata. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING all three appeals.

BACKGROUND

The appellant sought Board review of two matters that occurred during his employment with the Navy: A reassignment that occurred in 1985; and his resignation from the agency in 1986. The administrative judge found that the Board lacked jurisdiction to review the reassignment because the appellant had failed to show that this action involved a reduction in pay or grade. The administrative judge found that the Board was precluded from relitigating his 1986 resignation under the doctrine of res judicata, because that matter had already been the subject of a final board decision, *Wood v. Department of the Navy*, 43 M.S.P.R. 24 (1989),[2] and the appellant had not shown that the Board's decision was the result of a fraud perpetrated by the agency.

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[2] The administrative judge also noted that the Board had denied the appellant's request to reopen this appeal on January 17, 1992.

The appellant brought an individual right of action (IRA) appeal[3] against the Air Force, claiming that two actions -- a performance appraisal and the termination of a term appointment -- were taken in reprisal for whistleblowing disclosures. The administrative judge found that the Board had jurisdiction over these actions because each was a "personnel action" within the meaning of 5 C.F.R. § 1209.4(a), and the appellant had first sought corrective action from the Office of Special Counsel (OSC), as required by 5 U.S.C. § 1214(a)(3). She found, however, that the appeal must be dismissed as untimely filed.

By letter dated October 11, 1991, OSC notified the appellant that it was terminating its investigation of his complaint and advised him of his right to file an appeal with the Board. Initial Appeal File (IAF), Tab 1. Also on October 11, OSC issued a separate notice of appeal rights. *Id.* These two documents used slightly different language to describe the time limit for filing an appeal with the Board. The first stated that the "individual may file a request for corrective action with the Board within 65 days after the Special Counsel notifies the individual it has terminated the investigation into the individual's allegation of whistleblower reprisal."

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[3] IRA appeals are authorized by 5 U.S.C. § 1221(a) with respect to certain personnel actions that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board. *See* 5 C.F.R. § 1209.2(b)(1).

The second stated, "As we informed you in our closure letter of this date [October 11, 1991], we have terminated our investigation .... You have 65 days from that date to file your individual right of action petition with the Board pursuant to the Board's regulations."

The appellant presented evidence that the two notices, although dated October 11, were not postmarked until October 17, and were not received until October 28. IAF, Tab 1.[4] He claimed that he understood from the two notices that he had 65 days from the date of receipt, or until January 2, 1992, to file his appeal. The appeal was filed on that date. The administrative judge found that, to be timely, an IRA appeal must be filed within 65 days after the issuance of OSC's termination notice, and that the appellant's appeal, filed 79 days after OSC's termination notice, was therefore untimely. She next found that the time limit for filing an IRA appeal could not be waived for good cause shown. Finally, she found that, even if the time limit could be waived for good cause shown, the appellant had not established good cause.[5] She found in this regard that, although the statement in OSC's closure notice might be interpreted as allowing 65 days from the date of receipt, the second notice unambiguously and

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[4] Both the closure letter and the separate notice of appeal rights appear to have been mailed in the same envelope. *See id.*

[5] Because of our finding below that the time limit for filing an IRA appeal cannot be waived for good cause shown, we do not address the correctness of this finding.

correctly informed the appellant that the 65-day filing period started to run from the date the termination notice was issued.

In his petition for review, the appellant asks the Board to review each of the administrative judge's adverse findings and to afford him a hearing on the merits of his appeals.[6] Although we have denied the appellant's petition, we have reopened this case on our own motion under 5 C.F.R. § 1201.117, because we have not previously addressed the issue of whether the Board has the authority to waive the time limit for filing an IRA appeal.

ANALYSIS

Except in a case in which an employee has the right to appeal directly to the Board, an employee must seek corrective action with OSC before filing an IRA appeal with the Board. 5 U.S.C. § 1214(a)(3). Such an appeal is timely if "no more than 60 days have elapsed since notification was provided [by OSC] to such employee ... that [its] investigation was terminated ...." *Id.* The phrase "notification was provided" could be subject to more than one interpretation. It could refer to the date OSC issued its termination notice, the date

[6] He additionally contends that he was not mentally competent to comprehend a timeliness problem at the time he filed his IRA appeal. We note, however, that the appellant has not submitted evidence of such incompetence with his petition for review, and that he did not make this contention in the proceeding below. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

it mailed this notice to the employee, or to the date the employee received the notice. Although the statutory language may be ambiguous, the Board's construction of it in its implementing regulation is very clear:

> Under [5 U.S.C. § 1214(a)(3)], an appeal must be filed:
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> > (1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations ....

5 C.F.R. § 1209.5(a)(1).[7]

It is undisputed in this case that the appellant's IRA appeal was not filed within 65 days after the issuance of OSC's termination notice on October 11, 1991. It was therefore untimely under 5 U.S.C. § 1214(a)(3).[8] The remaining question is whether the Board has the authority to waive this time limit.

Although the Board's regulations governing IRA appeals do not directly address whether the time limit for filing an IRA appeal may be waived, they do provide that, "Except as

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[7] The Board stated that it employed this language "to clarify that the time for filing an individual right of action appeal, after termination of a Special Counsel investigation, begins to run from the date of issuance of the Special Counsel's written notification to the appellant and to increase the time limit for filing from 60 to 65 days to allow for mailing time." 55 Fed. Reg. 28,592 (1990).

[8] Relying on the statutory language alone, the appellant's IRA appeal was untimely regardless of whether the 60-day filing period began to run as of the date that OSC's notice was issued, mailed, or received. The only way for his appeal to be timely was if the filing period ran for 65 days from the date he received OSC's termination notice.

expressly provided in this part, the Board will apply subparts A, B, C, E, F, and G of 5 CFR part 1201 to appeals ... governed by this part." 5 C.F.R. § 1209.3. One of the regulations in subpart B of part 1201 provides that "[i]f a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown." 5 C.F.R. § 1201.22(c).

Despite this regulation, the administrative judge found, relying on our decision in *Speker v. Office of Personnel Management*, 45 M.S.P.R. 380 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991) (Table), that the time for filing an IRA appeal could not be waived for good cause shown. We there stated that a filing deadline prescribed by statute or administrative regulation can be waived only where: (1) The statute or regulation itself specifies circumstances in which the time limit will be waived; (2) an agency's affirmative misconduct precludes it from enforcing an otherwise applicable rule under the doctrine of equitable estoppel;[9] and (3) an agency's failure to provide a mandatory notice of election rights

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[9] Subsequent to the Board's decision in *Speker*, the Supreme Court held that the doctrine of equitable estoppel could not be applied to require the Federal government to grant monetary benefits to an individual who did not meet the statutory requirements for such benefits. *Office of Personnel Management v. Richmond*, 110 S. Ct. 2465, 2467, 2476 (1990). We accordingly modified *Speker* to the extent that it was in conflict with *Richmond*. *Fox v. Office of Personnel Management*, 50 M.S.P.R. 602, 606 n.4 (1991).

warrants the waiver of the time limit for making the election. 45 M.S.P.R. at 385.

We concur with the administrative judge that the first basis for waiver cited in *Speker* has no applicability to an IRA appeal. The Whistleblower Protection Act not only created the right to file an IRA appeal, it also set a statutory deadline for the filing of such an appeal, without making any provision for the acceptance of late filings. *See* 5 U.S.C. § 1214(a)(3). IRA appeals are thus unlike adverse action appeals, where the time limit for filing an appeal is governed exclusively by the Board's administrative regulation, *see* 5 C.F.R. § 1201.22(b), or petitions for review of initial decisions, where the statute itself provides for extension of the time limit "for good cause shown." *See* 5 U.S.C. § 7701(e)(1). We therefore conclude that the time limit for filing an IRA appeal cannot be waived for good cause shown under 5 C.F.R. § 1201.22(c).

We similarly find that neither of the other bases for waiver cited in *Speker* is applicable to this case. The appellant has alleged no facts that would support an equitable estoppel against the government.[10] Nor does he claim that OSC

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[10] The rule announced by the Supreme Court in *Richmond* against applying equitable estoppel against the Federal Government applies only to claims for monetary benefits. *See* 110 S. Ct. at 2467, 2476. We have no occasion to address whether *Richmond* applies to a performance appraisal or the termination of a term appointment, the matters challenged in the IRA appeal. We note that, although neither matter is a direct claim for a specific monetary benefit, the relief sought would include backpay and other monetary benefits.

failed to provide notice that it was terminating its investigation of his allegations of reprisal for whistleblowing activities, as required by 5 U.S.C. § 1214(a)(3).

Finally, we note that, subsequent to the Board's decision in *Speker*, the Supreme Court held that there is a rebuttable presumption that the doctrine of equitable tolling can be invoked in certain circumstances to excuse an untimely filed lawsuit against the Federal government. *Irwin v. Veterans Administration*, 111 S. Ct. 453, 457 (1990). Such circumstances include situations where a claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Id.* at 458. The doctrine does not extend to mere "excusable neglect," however. *Id.* The appellant here has alleged no facts that would bring him within the doctrine of equitable tolling. We therefore need not, and do not, decide whether the doctrine of equitable tolling may be invoked in appropriate circumstances to excuse an untimely filed IRA appeal.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final

decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.